



U.S. Fish and Wildlife Service  
Sacramento Fish and Wildlife  
Office  
2800 Cottage Way, Room W-  
2605 Sacramento, California  
95825-1846



National Marine Fisheries Service  
Protected Resources Division  
650 Capitol Mall, Suite 8-300  
Sacramento, California 95814-4706



California Department of Fish and Game  
1416 Ninth Street,  
Sacramento, California 95814

April 12, 2002

John Davis  
Acting Deputy Regional Director  
U.S. Bureau of Reclamation  
Mid Pacific Region  
2800 Cottage Way  
Sacramento, California 95825

Raymond D. Hart  
Deputy Director  
California Department of Water Resources  
1416 Ninth Street P.O. Box 942836  
Sacramento, California 94236

Dear Messrs Davis and Hart:

This responds to your letter dated April 12, 2002 requesting concurrence that the three tiers of assets, including the Environmental Water Account (EWA) are in place and operable for the 2002 water year and are sufficient to maintain regulatory commitments under the Endangered Species Act (ESA commitments) as described in the CALFED Record of Decision (ROD). We would like to acknowledge all who participated in the numerous meetings centered around EWA asset acquisition. We all knew it would be a difficult undertaking and these individuals have done an excellent job in acquiring the assets that are currently in place. Although we recognize that all assets and agreements as stated in the CALFED ROD are not yet fully established, specifically ground water storage and the anticipated level of variable asset tools, the Project Agencies' proposal provides a functional equivalent to the ground water storage component for this year. Further, due to the limited use of EWA assets to date, the need for variable assets to maintain a desired level of fishery protection has been reduced for this year.

The CALFED ROD outlines three items that are necessary in order for the CALFED Agencies to provide ESA commitments to south of Delta water users relating to water supply impacts above Tier 1. These include:

- 1) *Ecosystem Restoration Program (ERP) Plan Funding.* As part of Tier 2, the CALFED ERP must be funded to a level of at least \$150,000,000 dollars. It is our understanding that the current CALFED budget and plan is providing this level of funding for the ERP;

- 2) *A Fully Functioning Tier 2 EWA Over and Above the Tier 1 Level of Protection.* As the other part of Tier 2, there must be a fully functioning EWA providing fish protection capability over and above the Tier 1 level of protection. Based on (a) the current year funding levels, (b) the capability of the State Water Project (SWP) to “backstop” up to 100,000 acre-feet (AF) of EWA actions this year as a functional equivalent of the south of Delta storage component, (c) the acquisition of EWA assets commensurate with the ROD, and (d) the minimal use of EWA assets to date, allowing EWA to be used to make up for the reduced Tier 1 assets, this element has been met in the 90% exceedance forecast. We have reviewed the Project Agencies’ proposal to provide a functional equivalent to the ground water storage for this year and find that it gives the Management Agencies the ability to borrow up to 100,000 AF of EWA assets from the SWP this year, if needed for fish protection.
- 3) *A Tier 3 Strategy to be Developed and Implemented When Necessary.* We believe that Tier 3 is not dependent on the purchase of water and it is our understanding that Tier 3 water will be made available by the Project Agencies if necessary. This means Tier 3 is not an operational reserve for Tier 2, and consistent with the Tier 3 protocol, there is no guarantee that all water supply losses resulting from actions to avoid jeopardy can be fully mitigated. Therefore, it is our view that the Tier 3 strategy is sufficiently in place, as described in the protocol paper attached to your letter.

The Project Agencies and Management Agencies have agreed to the interim set of Operating Protocols attached to your letter. These protocols will guide us through the second year of EWA operation. We will continue to review and update the protocols as necessary and address any problems in a coordinated fashion for the remainder of the water year. In order to better prepare for future EWA operation we must continue to acquire the necessary EWA assets, develop long-term agreements for EWA asset acquisition and develop a more complete set of long-term operating protocols.

We appreciate the collaborative effort by the Project Agencies and Management Agencies in attempting to evaluate the effectiveness of the protections established for fish in light of the October 19, 2001 and February 5, 2002 decisions by the Federal District Court relative to the management and operation of the dedicated yield under Section 3406 (b)(2) ((b)(2)) of the Central Valley Project Improvement Act. These decisions have resulted in a reduction of Tier 1 assets from those levels defined in the CALFED ROD and programmatic biological opinions and have implications on the assumed level of protection for fish and the capability to acquire variable assets to the EWA through the (b)(2) operations (i.e., State gain). The October 2001 decision by the Court influenced how the Management Agencies managed (b)(2) assets on the Central Valley Project (CVP) streams in the fall. Subsequent hydrology and real time fish monitoring data in the Delta and upstream of the Delta indicated that fewer than anticipated (b)(2) and EWA actions were required to protect fish in the Delta during the late winter and early spring period. Because less EWA assets than expected have been used to date, significant

environmental water assets are still available for use in future months. Consequently, we are judging our ability to maintain ESA commitments this year based less on the volumes of water identified in the CALFED ROD and instead evaluating whether there are adequate EWA assets available now to effectively implement planned fish protection actions in the Delta during the rest of the water year.

The EWA was designed with the flexibility to address a range of hydrologies and fish protection measures. The analysis conducted by our respective staffs indicated in the March 2002 90% exceedance forecast that the EWA assets as described in your letter will be adequate to provide Delta actions to protect fish that are essentially equivalent to those actions previously being provided by a combination of (b)(2) fish actions and EWA fish actions. These Delta fish actions include (1) export reductions at the CVP and SWP to a combined 1,500 cubic feet per second (cfs) to benefit chinook salmon and delta smelt and to meet the Vernalis Adaptive Management Program (VAMP) export objective from April 15 through May 15; (2) export reductions to a combined 1,500 cfs from May 16 through 31 to benefit chinook salmon and delta smelt; and (3) a placeholder of approximately 145,000 AF for potential export reductions in June to protect delta smelt.

In the March 2002 50% exceedance forecast, EWA assets are adequate to meet actions (1) and (2) described above. It should be noted however, that the placeholder of approximately 195,000 AF for potential export reductions in June to protect delta smelt may not provide the same level of protection as the June placeholder does in a 90% forecast because forecasted pumping rates are higher in the wetter, 50% exceedance hydrology. We are also concerned that in the 50% forecast more MWD source shifting may be required to protect San Luis Reservoir lowpoint, and the EWA may carry a significant water and financial debt into next year. Thus, providing fish protection in this hydrological scenario places an increased risk on 2003 operations and on the ability to provide ESA commitments next year.

Although it appears that for the remainder of the water year under the 2002 90% hydrology, there are adequate EWA assets to provide for Delta fish actions including those which were planned to be implemented using (b)(2) assets prior to the Court's February 5, 2002 decision, a longer term evaluation is needed. We recommend that an evaluation of the long-term impacts to Tier 1 proceed expeditiously in order to be concluded prior to water year 2003.

In summary, based on our review of the March 2002 90% exceedance forecast which is consistent with the presentation to Bennett Raley, the Assistant Secretary of the Interior for Water and Science and Mary Nichols, the Secretary for California Resources Agency, at the March 13, CALFED Policy Meeting, it is our assessment that all of the necessary elements (or their functional equivalent) identified in the CALFED ROD for ESA commitments are in place and functional for the remainder of this water year. Therefore, the Management Agencies, by this letter agree that there are sufficient EWA assets in place to maintain ESA commitments for the remainder of water year 2002. This commitment assumes a 90% hydrology, a SWP allocation of 60% and implementation of the Delta fish actions described previously. Our assessment of the March 2002 90% forecast also shows the greatest potential of implementing

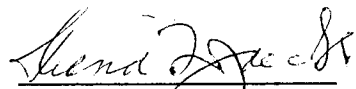
Delta fish actions while allowing for an increase in the CVP allocation south of Delta to 55%. We would like to stress again that we must continue working diligently in the acquisition of EWA assets in order to maintain ESA commitments in the event that hydrologic conditions are wetter, i.e., similar to the 50% hydrology. It is important to note that we are able to maintain ESA commitments because we have had an unusual year and have used only 66,000 AF of EWA assets to date, thus allowing EWA to be used to make up for the reduction in Tier 1 assets. We emphasize that we will all need to use the remainder of the year to fully develop assets and resources for the next two years and to establish an EWA that is fully operational and sufficient to meet CALFED's needs for the long-term.

The Management Agencies are committed to using available EWA resources, either the fixed acquired assets or the variable asset tools, to minimize or avoid any impacts to the south of Delta water contractors from implementing fish protection measures this year. We intend to use the available EWA assets for the primary purpose of protecting fish species listed pursuant to the State or Federal Endangered Species Acts. We will manage the EWA assets essentially on a first need basis until the assets are expended. We intend to use EWA assets for the purposes of protection and enhancement of these species as the EWA was intended to do and not solely as an incidental take management tool. We are committed to evaluating the realtime information and anticipated future conditions and, if appropriate, shifting the use of EWA assets to later in this water year and for other listed species to minimize the potential for effects of any fish protection measures on south of Delta water users. This includes following the protocols set forth in the Conditions for Program Level Regulatory Commitments in the Conservation Agreement Regarding Multi-Species Conservation Strategy. (Record of Decision, Attachment 5, pages 9-10.) That agreement outlines steps for communications, coordination and species protection actions among and between the Management Agencies and Project Agencies.

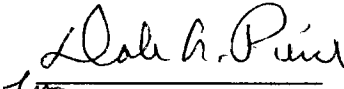
In closing, we are gravely concerned about our capability to continue to ensure regulatory commitments pursuant to the ESA in Water Year 2003 and beyond. The inability to retain EWA assets in San Luis Reservoir this year amplifies the need to develop the capability to carryover or store EWA assets. We also need to proceed with an evaluation of the long-term effect of Tier 1 degradation. Furthermore, the uncertainty of long-term funding and multi-year purchase agreements for EWA assets present a significant challenge that must be addressed. The Management Agencies are committed to ensure that the CALFED ROD continues to be implemented in a biologically appropriate manner, consistent with the CALFED goals of restoration and recovery. We will continue to work collaboratively with the Project Agencies throughout the water year.

If you have any questions regarding this letter, please contact Michael G. Thabault at the Service (916) 414-6600, Jim White at the Department of Fish and Game (916) 653-3540, or Michael Aceituno, at the National Marine Fisheries Service (916) 930-3600.

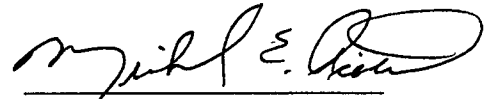
Sincerely,



Diana Jacobs  
Deputy Director Science Advisor  
California Dept. of Fish and Game



for Wayne S. White  
Field Supervisor  
Fish and Wildlife Service



for James Lecky  
Asst Regional Administrator  
National Marine Fisheries  
Service